statute expressly forbidding such instruction in a criminal case similar to Code 1919, § 6003, applying to civil cases.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 734.]

Error to Corporation Court of Roanoke.

William Myers and another were convicted of breaking and entering a railroad car, and they bring error. Affirmed.

A. B. Hunt and *Lawson Worrell,* both of Roanoke, for plaintiffs in error.

John R. Saunders, Atty. Gen., J. D. Hank, Jr., Asst. Atty. Gen., and *Leon M. Bazile, Second Asst. Atty. Gen.,* for the Commonwealth.

DRAPER *v.* COMMONWEALTH.

March 16, 1922.

[111 S. E. 471.]

1. Grand Jury (§ 34*)—Appearance of Prosecuting Attorney during Deliberations Does Not Require Abatement of Indictment unless Prejudicial.—Though it was a violation of Code 1919, § 4864, for the prosecuting attorney to appear before the grand jury during their deliberations when not sworn as a witness, his appearance before them does not require an abatement of the indictment unless it prejudiced defendant.

[Ed. Note.—For other cases, see 6 Va.-W. Va. Enc. Dig. 756.]

2. Statutes (§ 225¾*)—Incorporation of Prior Code Section in Later Code without Change Adopts Prior Construction.—Where the revisors and Legislature incorporated a section of the Code of 1904, without change, in the Code of 1919 as section 4864, they impliedly adopted the construction placed on the former Code section.

[Ed. Note.—For other cases, see 12 Va.-W. Va. Enc. Dig. 770.]

3. Grand Jury (§ 34*)—Advice to Grand Jury Held Not to Have Prejudiced Accused.—Where the prosecuting attorney, when he appeared before the grand jury at their request without being sworn as a witness, merely advised them that they could strike from an indictment against numerous defendants as presented to them the names of two of those defendants, the attorney's appearance was not prejudicial to another defendant charged by the same indictment, and does not entitle that defendant to an abatement of the indictment.

[Ed. Note.—For other cases, see 6 Va.-W. Va. Enc. Dig. 756.]

4. Criminal Law (§§ 317, 351 (10), 721½ (2)*)—Commonwealth Could Inquire whether Defendant Kept a Material Witness Away, and Inference and Argument Thereon Proper.—In a prosecution for participation in a mob which attempted to lynch a prisoner, where a

---

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

witness for the commonwealth had testified that he and a brother of accused were members of the mob, and had restrained accused from shooting at a negro on the way, the brother of accused would have been a material witness; and it was competent for the proseeution to show it had attempted to procure his presence and to inquire of both accused and his father whether they had anything to do with keeping the witness away, and the fact that the defendant made no attempt to produce the brother as a witness was a matter for fair inference and argument.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 82.]

5. Criminal Law (§ 1119 (4)*)—Argument Objected to Must Be Shown by Record.—Alleged error in the argument of the prosecuting attorney cannot be reviewed, where there is nothing in the record to show, either that the argument was made, or that it was objected to, since error must be affirmatively shown by the record.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 581.]

6. Criminal Law (§ 511 (10)*)—Accomplices Cannot Corroborate Each Other.—Where two or more accomplices are produced as witnesses, they cannot corroborate each other, but the same corroboration is required as if there were only one.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 972.]

7. Criminal Law (§§ 510, 829 (10)*)—Conviction May Be Based upon Uncorroborated Accomplice Testimony; Refusal of Requested Charge Accomplices Could Not Corroborate Each Other Held Not Prejudicial in View of Charge Given.—Where the court had charged the jury that a conviction might be based upon the testimony of an accomplice without any corroboration, which was correct, but that such testimony should be received with caution, it was not prejudicial error to refuse a requested charge that an accomplice could not be corroborated by the testimony of another accomplice.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 77.]

8. Criminal Law (§ 572*)—Defendant Need Not Establish Alibi by Preponderance of Evidence.—In a prosecution of an offense which necessarily involved the presence of accused at the commission thereof, proof of his presence is an essential part of the prosecution's case, and he need not prove the defense of alibi by a preponderance of the evidence, but only by evidence sufficient to raise a reasonable doubt as to his presence.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 290.]

9. Criminal Law (§ 822 (13)*)—Instruction Requiring Proof of Alibi by Preponderance of Evidence Held Cured.—A statement in an instruction that, where the accused relies upon an alibi, the burden of proving it rests upon accused, although indicating that alibi must be proved by preponderance of evidence, does not require a reversal,

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

taking the instruction as a whole, where the prosecution was required to prove every element of the offense beyond a reasonable doubt, and the court gave several instructions at the request of accused to the effect that the jury must acquit if they had any reasonable doubt of the guilt of the accused, which must have existed if the jury had any doubt as to whether accused was present in the commission of the offense.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 743.]

10. Criminal Law (§ 723 (1)*)—Argument of Prosecuting Attorney Held Not Appeal to Passion.—In a prosecution of accused for participation in a mob which attempted to lynch a negro, where the evidence showed there was considerable shooting by the mob and damage was done to the jail, an argument by the prosecuting attorney, inquiring whether a crowd of moonshiners were to be permitted to come into the town, shoot it up, frighten the women and children, break into the jail and destroy the county's property and go unpunished, was not unsupported by the evidence, and was not an appeal to passion and prejudice, even though accused was not charged with the commission of any of those acts.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 715.]

11. Criminal Law (§ 713*)—Considerable Latitude Is Allowed in Argument.—Very considerable latitude must be allowed to counsel in the argument of their cases.

Burks, J., dissenting.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 715.]

Error to Circuit Court, Halifax County.

John H. Draper was convicted of assault, and he brings error. Affirmed.

Martin & Leigh, of South Boston, for plaintiff in error.

John R. Saunders, Atty. Gen., J. D. Hank, Jr., Asst. Atty. Gen., and *Leon M. Bazile, Second Asst. Atty. Gen.,* for the Commonwealth.

GREEN *v.* COMMONWEALTH.

June 15, 1922.

[112 S. E. 562.]

1. Criminal Law (§ 1159 (5)*)—Verdict on Positive Evidence Conclusive on Appeal.—In a robbery prosecution, where the state's testimony of defendant's presence and of the assault and battery was direct and positive, the verdict of the jury on that point is conclusive upon appeal.

[Ed. Note.—For other cases, see 5 Va.-W. Va. Enc. Dig. 351.]

2. Robbery (§ 24 (1)*)—Evidence Held Insufficient to Convict of

---

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.